IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

EDWARD KENNEDY et at,

Plaintiffs,

v.

RICHARD HUGHES et at,

Defendants.

CIVIL NO. 01-1183 WJ/LFG

JUDGMENT AND ORDER OF DISMISSAL

THIS MATTER came before the Court upon Defendant Richard Hughes' Motion to Dismiss Complaint [Docket No.25] and a Motion to Dismiss Complaint [Docket No.5] filed by Defendants Dasheno, E. Tafoya, Baca, C. Suazo, J. Gutierrez, A. Suazo, Chavarria, Shije, F. Tafoya, Warren, D. Gutierrez, and G. Gutierrez (the "Tribal Defendants"). Pursuant to the findings and conclusions set forth in the Memorandum Opinion and Order which accompanies this Rule 58 Judgment.

IT IS THEREFORE ORDERED and ADJUDGED that Defendant Richard Hughes' Motion to Dismiss Complaint [Docket No.25] and the Tribal Defendants' Motion to Dismiss Complaint [Docket No.5] are GRANTED and Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

s/ William Johnson

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

EDWARD KENNEDY et al.,

Plaintiffs,

v.

RICHARD HUGHES et at,

Defendants.

No. CIV 01-1183 WI/LFG

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court pursuant to Defendant Richard Hughes' Motion to Dismiss Complaint [Docket No.25] and a Motion to Dismiss Complaint [Docket No.5] filed by Defendants Dasheno, E. Tafoya. Baca, C. Suazo, J. Gutierrez, A. Suazo, Chavarria, Shije, F. Tafoya, Warren, D. Gutierrez, and G. Gutierrez (the "Tribal Defendants").

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Plaintiffs filed a Complaint in this Court on October 12, 2001. Plaintiff Kennedy is a resident at Santa Clara Pueblo, an enrolled member of the Blackfeet Indian Tribe, and married to Plaintiff Singer. Plaintiff Singer is a resident of the Santa Clara Pueblo and an enrolled member of the Santa Clara Indian Pueblo. The "Tribal Defendants" are all enrolled members of the Santa Clara Indian Pueblo and officials of the Pueblo. These persons are sued in their

individual capacities. Defendant Hughes is an attorney who provided legal services to the Tribal Defendants. Hughes is a non-Indian and does not reside at the Santa Clara Pueblo. Plaintiffs' Complaint alleges federal question jurisdiction under 28 U.S.C. § 1331 pursuant to the Indian Civil Rights Act of 1968 (ICRA). 25 U.S.C. §§ 1302 et seq. Plaintiffs essentially allege that the Hughes and the Tribal Defendants violated their rights under the ICRA by drafting and adopting a tribal resolution that retroactively reinstated tribal sovereign immunity in tribal court while Plaintiffs had a claim against the tribe pending in tribal court.

DISCUSSION

Defendant Hughes and the Tribal Defendants argue that this Court lacks jurisdiction over Plaintiffs claims, or alternatively, Plaintiffs have failed to state a claim upon which relief can be granted because the ICRA does not create a private cause of action on which a party may bring a civil action such as Plaintiffs' complaint. Defendant Hughes and the Tribal Defendants also urge that Plaintiffs' claims should be dismissed based on legislative immunity, failure of Plaintiffs to exhaust tribal remedies, and res judicata. Defendant Hughes additionally argues that Plaintiffs' claims should be dismissed because the tribal resolution at issue in this case did not violate any of Plaintiffs' rights as it was not a bill of attainder and did not deprive Plaintiffs of liberty or property. Defendant Hughes further asserts that there was no conspiracy between Hughes and Tribal Defendants. Finally, Defendant Hughes urges this Court to find that Tribal Defendants and Hughes are entitled to qualified immunity.

This Court finds that it does not have jurisdiction over Plaintiffs' claims, or, alternatively, that Plaintiffs fail to state claims upon which relief can be granted because the ICRA does not authorize a cause of action such as Plaintiffs'. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Thus, this Court need not address and will not decide the other issues

raised by Defendants, many of which appear to be issues of first impression in the Tenth Circuit. The Court commends Defendants for their briefs on these other issues, and while tempted to engage in an academic discussion of the application of legislative immunity, res judicata, and qualified immunity to this case, the Court will save these issues for another day and another case. The ICRA provides that "No Indian tribe in exercising its powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law. . .." 25 U.S.C. § 1302. As the Supreme Court noted in Martinez, the only express remedial provision found within the ICRA is Section 1303 which extends the writ of habeas corpus in federal court to test the legality of a person's detention by order of an Indian tribe. 436 U.S. at 58. The Court in Martinez held that, in passing the ICRA, Congress did not intend to create a federal forum for issues arising under Section 1302 of the ICRA and that the failure to provide a remedy other than habeas corpus was a deliberate one. Id. at 59-60. Thus, in accordance with Martinez, a plaintiff alleging a violation under the ICRA does not state a claim upon which relief can be granted unless plaintiff is in court by writ of habeas corpus. Additionally, courts have found that federal question jurisdiction does not lie for a claim under the ICRA except by writ of habeas corpus. See Olguin v Lucero, 87 F.3d 401 (10th Cir. 1996).

Plaintiffs urge this Court to allow their ICRA claim to proceed in federal court under the exception to Martinez found in Dry Creek Lodge. Inc. v Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980). The "absolute necessity" exception found in Dry Creek Lodge is narrowly construed. White v Pueblo of San Juan, 728 F.2d 1307 (10th Cir. 1984). In order to qualify for the Dry Creek exception, a plaintiff must demonstrate that the dispute involves a non-Indian party, that a tribal forum is not available, and that the dispute involves an issue falling outside internal tribal

affairs. Ordinance 59 Ass'n v United States Dep't. of the Interior Secretary, 163 F.3d 1150,1156 (l0th Cir. 1998).

Plaintiffs contend that Plaintiff Kennedy is a non-Indian party to this dispute. The Court recognizes that Plaintiff Kennedy is not a member of the Santa Clara Pueblo, but is an enrolled member of the Blackfeet Indian Tribe. Dry Creek and its progeny have not clarified whether a non-member Indian would qualify as a non-Indian for purposes of the Dry Creek exception. This Court, however, need not delve into this delicate matter because Plaintiffs have failed to show that they would be entitled to the exception if Kennedy was found to be a non-Indian.

Plaintiffs have failed to show that a tribal forum is not available to address their dispute. Plaintiffs state that a tribal forum is effectively and practically unavailable because the tribal forum has been dilatory in addressing Plaintiffs' various causes of action, and because the tribal government disbanded its appellate court system and adopted an intertribal appellate forum during the pendency of Plaintiffs' appeal from the tribal court decision on their case. Complaint ¶¶ 77, 78, 97, 98, 101. Plaintiffs are required to show that a tribal forum is actually unavailable; allegations of futility are insufficient. See White v. San Juan Pueblo, 728 F.2d 1307,1313 (10th Cir. 1984); Jimi Development Corp. v. Ute Mountain Ute Indian Tribe, 930 F.Supp. 493 (D. Colo. 1996). Because Plaintiffs admit in their pleadings that their various cases are still pending before the tribal fora, they have failed to show that no tribal forum is available.

Plaintiffs also fail to show that their dispute involves issues falling outside internal tribal affairs. Plaintiffs' dispute involves the tnbal council's decision regarding tribal sovereignty in a civil rights suit in tribal court, and the tribal council's decision regarding the tribal court structure. Complaint ¶¶ 85, 98, 108 -115, 117- 121, 123, 124, 125, 126. These issues are plainly internal tribal affairs and are at the very heart of tribal self-governance and self-detennination. Thus, Plaintiffs have failed to show that the Dry Creek

exception applies in this case. Accordingly, Defendants are entitled to a dismissal of all claims with prejudice because Plaintiffs have failed to state a claim upon which relief can be granted or, alternatively, this Court lacks subject matter jurisdiction to hear Plaintiff's claims.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant Richard Hughes' Motion to Dismiss Complaint [Docket No.25] and the Tribal Defendants' Motion to Dismiss Complaint [Docket No.5] are GRANTED and Plaintiff's Complaint is DISMISSED with prejudice in its entirety.

s/ William Johnson

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDWARD KENNEDY, et al.,

Plaintiffs,

v.

RICHARD HUGHES, et al,

Defendants.

CIVIL NO. 02-2112

ORDER AND JUDGMENT

Plaintiffs, members of two different Indian tribes, filed suit in federal district court against several officials of the Santa Clara Pueblo Tribe, claiming violations of their civil and constitutional rights as protected by the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301 et seq. Concluding that ICRA does not authorize plaintiffs' suit, the district court dismissed the action. *Kennedy v. Hughes,* No. CIV 01-1183 WJ/LFG, slip op. at 5 (D.N.M. Mar. 27, 2002). In order to resolve the issue presented, we reassess the extent to which Congress created a private cause of action under ICRA. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I

Edward Kennedy, a member of the Blackfeet Indian Tribe, and his wife Catherine A. Singer, a member of the Santa Clara Pueblo (collectively, "plaintiffs"), both reside on the

Santa Clara Pueblo reservation. In 1996, plaintiffs filed a suit in the Santa Clara Tribal Court against Chief Judge Silva of that court and fourteen Santa Clara Tribal Council ("Council") members, claiming that their civil rights were violated when Chief Judge Silva incarcerated Kennedy and seized property belonging to Singer. Richard Hughes was retained by the Council to defend this suit. On September 11, 1997, Santa Clara Tribal Court Judge H. Paul Tsosie granted defendants' motion to dismiss the complaint. Plaintiffs then appealed to the Santa Clara Pueblo Tribal Court of Appeals, which reversed the tribal court's dismissal in 1998 and remanded for further proceedings.

Central to the tribal appeal of plaintiffs' Tribal Court suit against Silva and the Tribal Council members was whether a waiver of the tribe's sovereign immunity for purposes of civil rights actions continued to be in effect. In 1981, the Council had enacted a Law and Order Code ("Code") that contained a waiver of immunity for civil rights actions. In December 1983, the Council repealed this waiver by resolution, reaffirming its immunity from suit and that of its members, officers, employees, and staff. In March 1985, however, the Council reenacted the 1981 Code, but, according to the Council, the reenactment was "subject to all intervening changes, including the repeal of [the waiver provision]." (Appellant's App. at 75.) Nonetheless, Hughes advised the Council following the remand of plaintiffs' suit that the status of the waiver was uncertain, and suggested a proposed resolution reaffirming the tribe's sovereign immunity in civil rights cases. This resolution was passed in November 1998 as Resolution No. 98-29. Following the enactment of this resolution, the plaintiffs filed a new action in the Santa Clara Tribal Court against Hughes and all the members of the Council who had voted to adopt Resolution No. 98-29. In this action, the plaintiffs claimed that Resolution No. 98-29 violated their rights under the Santa Clara Pueblo Constitution and their rights under the U.S. Constitution as protected by ICRA. Judge Frank DeMolli, appointed as

Tribal Judge pro tempore, granted defendants' motion to dismiss. Plaintiffs did not appeal this order.

In October 2001, plaintiffs filed the present suit in federal district court against several tribal officials (collectively "Tribal Defendants") and Hughes. In this action, plaintiffs claimed that the Tribal Defendants and Hughes had violated their constitutional rights as protected by ICRA, 25 U.S.C. § 1302 ("No Indian tribe in exercising powers of self-government shall ... deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."). Specifically, plaintiffs made the same argument they had raised in their second suit in tribal court, claiming that the enactment of Regulation No. 98-29 violated the Santa Clara Pueblo Constitution, the United States Constitution, and § 1302 of ICRA, insofar as it denied them due process and equal protection of the law. Plaintiffs sought compensatory and punitive damages as well as declaratory relief. Hughes and the Tribal Defendants filed separate motions to dismiss, arguing, among other grounds, that § 1302 of ICRA does not create a cause of action for this claim in federal court. The district court dismissed the action pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim or, in the alternative, for lack of subject matter jurisdiction. *Kennedy v. Hughes,* slip op. at 5. Plaintiffs appeal this decision.

II

A dismissal for lack of subject matter jurisdiction is reviewed de novo. *U.S. West, Inc. v. Tristani,* 182 F.3d 1202, 1206 (10th Cir.1999). In reviewing a dismissal for failure to state a claim under Rule 12(b)(6), we accept all well-pleaded factual allegations in the complaint as true and view them in the light most favorable to the nonmoving party. *Sutton v. Utah State Sch. for the Deaf & Blind,* 173 F.3d 1226, 1236 (10th Cir.1999). The legal sufficiency of a complaint is a question of law; therefore, a Rule 12(b)(6) dismissal is

reviewed de novo. *Id.* Because plaintiffs' federal suit in the instant case is based on § 1302 of ICRA, we consider as a threshold matter whether a private cause of action may be brought under that section. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 69, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), the Supreme Court held that the only provision of ICRA that authorizes a private cause of action is § 1303, the habeas corpus provision. The Court held that § 1302, the section under which plaintiffs bring the instant action, "does not impliedly authorize actions for declaratory or injunctive relief against either [a] tribe or its officers." *Id.* at 72. We recognized a limited exception to this rule in the case of *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir.1980), and plaintiffs claim that their action falls under the *Dry Creek* exception to *Santa Clara.* In *Dry Creek,* the plaintiffs were non-Indians involved in a land dispute with two Indian tribes. *Id.* at 683-84. Although we acknowledged *Santa Clara* as governing authority, we nonetheless noted that the *Dry Creek* plaintiffs had "no remedy within the tribal machinery nor with the tribal officials in whose election they cannot participate." *Id.* at 685. We accordingly distinguished *Santa Clara* on the grounds that *Santa Clara* involved "entirely an internal matter concerning tribal members" and that "[t]he members of the Tribe who were seeking relief also had access to their own elected officials and their tribal machinery to settle the problem." *Id.* We have held that our holding in *Dry Creek* must be interpreted narrowly to avoid conflict with the Supreme Court's decision in *Santa Clara. White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir.1984). In order for the *Dry Creek* exception to apply, "[a] plaintiff must demonstrate: the dispute involves a non-Indian party; a tribal forum is not available; and the dispute involves an issue falling outside internal tribal affairs." *Ordinance 59 Ass'n v. U.S. Dep't of the Interior Sec'y*, 163 F.3d 1150, 1156 (10th Cir.1998).

In the instant case, the district court concluded that plaintiffs

had failed to satisfy the second two requirements for the *Dry Creek* exception to apply. *Kennedy v. Hughes,* slip op. at 4-5. As to the existence of a tribal forum, the district court concluded that a tribal forum is available in this case, as plaintiffs have filed two actions before the Santa Clara Tribal Court, the second of which involved the same claim as in the instant federal case.

In this Court, plaintiffs assert that they "have demonstrated that no tribal forum is viable to hear and decide their claims." (Appellants' Br. at 9.) According to plaintiffs, "[a] pro tem judge appointed by the Tribal Defendants determined that Appellants' second complaint should be dismissed because the Santa Clara Tribal Defendants' actions were not subject to judicial review." (*Id.* at 6.) This misrepresents the tribal court's decision. Judge Frank Demolli, appointed to hear plaintiffs' case in tribal court, expressly ruled that the court had "both subject matter and personal jurisdiction" over the case (Appellants' App. at 101), and rejected plaintiffs' claims on the merits under ICRA as well as the Constitution and Bylaws of the Santa Clara Pueblo. In an extensive written opinion relying on both federal and tribal court precedent, Judge Demolli held that Santa Clara Pueblo tribal courts are available as forums for adjudication of civil rights claims under ICRA and other law, and that "[a]ny civil rights claim shall be reviewed using the background of tribal sovereignty and in the context of the Pueblo of Santa Clara's unique tribal law and custom." (*Id.* at 106.) Judge Demolli then proceeded to explain why plaintiffs' claims of due process, equal protection, and bill of attainder violations were deficient on the merits to state a claim on which relief may be granted. Plaintiffs did not appeal.

The *Dry Creek* exception thus plainly does not apply. In *Dry Creek,* there was "no forum where the dispute can be resolved and the personal and property rights asserted by plaintiffs be considered." 623 F.2d at 684. Here, by contrast, the Santa Clara Pueblo has made its tribal courts available

for vindication of such rights. This is precisely as contemplated by the Supreme Court: "Tribal forums are available to vindicate rights created by the ICRA.... Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 65. Plaintiffs have taken advantage of that forum, not once but twice. They did not prevail on the merits, but that does not entitle them to take their claim to federal court.

In light of the availability of a tribal forum, we need not consider whether plaintiffs' case satisfies any of the other elements of the *Dry Creek* exception. Because *Santa Clara* holds that there is no private cause of action under ICRA outside the habeas context and plaintiffs fall under no exception to this rule, the district court correctly dismissed this suit for lack of subject matter jurisdiction or failure to state a claim upon which relief may be granted.

III

The judgment of the district court is **AFFIRMED.**

s/ Carlos F. Lucero

CIRCUIT JUDGE

§ 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall--

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.